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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CURTIS LEE MORRISON, Defendant and Appellant.	A156981 (Contra Costa County Super. Ct. No. 16154)

Enacted in 2018, Senate Bill No. 1437 (2017–2018 Reg. Sess.) (SB 1437) amended the definition of murder in Penal Code sections 188 and 189 (Stats. 2018, ch. 1015, §§ 2–4) to reduce the scope of the felony-murder rule and the natural and probable consequences doctrine. SB 1437 also added Penal Code section 1170.95[1] to establish a procedure whereby persons previously convicted of murder, who could not be convicted under the new definitions, could petition to have their convictions vacated. Appellant Curtis Lee Morrison contends that his hand-written petition made out a prima facie showing for relief, so it was error for the trial court to summarily deny it without a hearing. As he sees it, once a petitioner alleges that he satisfies the statutory criteria, the trial court's functions becomes purely ministerial:

[1] Statutory references are to the Penal Code unless otherwise indicated. Unlabeled references to subdivisions are to subdivisions of section 1170.95.

the court *must* issue the order to show cause, *must* schedule a hearing and—if requested by the petitioner—*must* appoint counsel to represent him at the hearing. Moreover, according to Morrison, because the trial court cannot look behind the allegations of the petition, it was error for the court here to consult its own file to determine the veracity of the petition's allegations. We conclude that Morrison's arguments are contrary to the language of section 1170.95, to established practice, and to the efficient operation of the courts. For these reasons, we affirm the summary denial.

BACKGROUND

SB 1437

One of the two purposes of SB 1437 was to redefine the concepts of malice and accomplice liability. Commencing January 1, 2019, "Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) Murder convictions would henceforth be restricted to those persons who (1) actually commit the murder, or (2) aid or abet the actual killer, or (3) is a major participant who acts with reckless indifference to human life. (§ 189, subd. (e).)

The other goal was to establish a mechanism for certain categories of persons convicted under the former statutes to have their murder convictions re-examined and set aside. "A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

"(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

"(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

"(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective [by SB 1437]." (§ 1170.95, subd. (a).)

"The petition shall include . . . A declaration by the petitioner that he or she is eligible for relief . . . based on all the requirements of subdivision (a)." (§ 1170.95, subd. (b)(1)(A).)

If the petitioner makes a prima facie showing that he or she could not now be convicted of first or second degree murder, the court is to issue an order to show cause and hold a hearing at which "the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible" for relief. Upon request, the court shall appoint counsel for the petitioner. "If the prosecution fails to sustain its burden of proof, the prior conviction . . . shall be vacated and the petitioner shall be resentenced" on any remaining counts. (§ 1170.95, subd. (d)(3).)

SB 1437 has a major exception: it "does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties." (§ 189, subd. (f).)

As statutes go, section 1170.095 is fairly compact, logically structured, and readily comprehended. Its provisions have been expertly analyzed by Presiding Justice Perluss in *People v. Verdugo* (2020) 44 Cal.App.5th 320. There is no point in our retracing or restating that analysis. Our

examination of the statute is confined to that necessary to resolve the specific arguments advanced by Morrison.

The Proceedings Below

On January 10, 2019, Morrison filed his eight-page, typewritten "Motion requesting Resentencing Under . . . Senate Bill No. 1437." The petition recites the statutory language of subdivision (a), but has nothing in the way of actual statements by Morrison that he satisfied the statutory requirements.[2]

The petition then has four pages where Morrison sets out his view of the evidence, including his own testimony, introduced at the trial (which apparently occurred in 1974). Morrison states that the jury was instructed with CALJIC No. 8.21 on felony-murder, but he then states he "was not charged with robbery nor was he found guilty of robbery, therefore he could not be held guilty of robbery when no robbery was charged or found by the beyond the reasonable doubt standard with in [*sic*] that instruction, these are the fact that make this petitioner eligible for relief under section 188 or 189." The petition concludes with Morrison's "request that his sentence be recalled," a request "made based on the complaint filed against this petitioner that allowed the prosecution to proceed under a theory of first degree felong [*sic*: felony] murder, according to Morrison V Estelle No. 92-15041 D.C. CV-90-02858-TEH, Filed December 3rd 1992." The words "natural and probable consequences" are not present.

Morrison's petition went to Judge John W. Kennedy, who has vast experience with criminal law. Although Judge Kennedy concluded "The

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[2] Section 1170.95 also requires the petition to include "[t]he superior court case number and the year of the petitioner's conviction." (§ 1170.95, subd. (b)(1)(B).) Morrison's petition did not include this information.

petition is summarily denied," the characterization is not entirely accurate. The denial was in the form of a six-page order prepared by Judge Kennedy, and was based on two grounds: (1) "it is clear that petitioner has not made a prima facie showing that he falls within the provisions of section 1170.95," and (2) "for the independent reason that [Morrison's] victim was . . . a Martinez police officer who was in uniform and was carrying his service revolver."

Morrison perfected a timely appeal from the order, which we treat as an appealable post-judgment order affecting his substantial rights. (§ 1237, subd. (b); *People v. Larios* (2019) 42 Cal.App.5th 956, 961, review granted February 26, 2020, S259983.)

DISCUSSION

Morrison's Arguments

Appointed counsel has filed a lengthy brief that advances a single essential point, namely, that Judge Kennedy was bound to accept the allegations of Morrison's petition as true until disproven at the hearing he was obliged to hold. Lest there be any misunderstanding, we set out the arguments in some detail.

Morrison begins by positing that "proceedings under section 1170.95 were created by statute, and thus are 'special proceedings,' " requiring that the terms and conditions of that statute must be strictly followed. He then quotes from subdivision (c): " 'If the petitioner makes a prima facie showing that he or she is entitled to relief, the court *shall* issue an order to show cause.' (Emphasis added.) (See also *In re Taylor* (2019) 34 Cal.App.5th 543, 562 ['Upon receiving a petition that is supported by the petitioner's declaration that all three conditions are met and that makes a "prima facie showing that the petitioner falls within the provisions["] . . . the sentencing

court must issue an order to show cause . . . [and] must then "hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts["] '].) [¶] The court failed to follow this procedure because it made a determination that the petition did not set forth a prima facie case," thereby failing to "follow established standards in determining whether a prima facie case had been made," specifically, "standards require[ed] the court to take the petitioner's factual allegations as true."

Morrison then asserts that "although the court stated that appellant 'has not made a prima facie showing that he falls within the provisions of section 1170.95,' in fact, it went beyond the factual assertions in the petition to analyze the evidence as it was outlined in the Ninth Circuit Court of Appeals opinion.[3] [Citation.] The court's decision was on the merits, even though the court described its finding that appellant had not made a prima facie case for relief." "The Superior Court's only duty in reviewing the petition at the initial stage of the proceeding was to determine whether the petition made a prima facie showing that appellant 'falls within the provisions of this section.' [¶] However, because the court went beyond that determination and engaged in an analysis of the evidence presented at trial, it exceeded its statutory authority."

Morrison is quite candid in his position: if a petitioner frames allegations which track the three elements specified in section 1170.95, subdivision (a), the trial court must accept the truth of those allegations, and has only the ministerial duty to issue the order to show cause and conduct "a hearing to determine whether to vacate the murder conviction." (§ 1170.95, subd. (d)(1).) Or, as he puts it at another point, the court cannot inquire

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[3] *Morrison v. Estelle* (9th Cir. 1992) 981 F.2d 425.

"beyond the face of the petition," and is "not authorized" to seek out information or consult materials that contradict the petition's allegations. Thus, according to Morrison, Judge Kennedy "not only erred by going beyond [his] function to determine if the three required allegations had been made in the petition, [he] further erred by engaging in an analysis of the evidence as outlined in the Ninth Circuit opinion," it being "well established that an appellate opinion cannot be used to prove the circumstances of the crime."

Judge Kennedy Did Not Err By Examining The File To Determine Whether Morrison Had Made A Prima Facie Showing Of His Entitlement To Relief Under Section 1170.95

There is no question that Judge Kennedy did not believe himself restricted to the "face of the petition," as Morrison puts it. Judge Kennedy justified what he did by quoting from "a primer on SB 1437" written by retired Judge J. Richard Couzens: "The court should conduct a preliminary review of the petition to determine whether petitioner has met his burden to make a prima facie showing for relief . . . . While the court must determine whether a prima facie basis has been shown, the statute does not specify the process for making that determination, other than the court is to consider any response or reply filed by the parties. Nothing in the statute [i.e., § 1170.95], however, limits the court's consideration to the response and reply, and *nothing precludes the court from conducting its own review of other readily available information, such as the court's file*. It would be *a gross misuse of judicial resources* to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains sufficient summary allegations which would entitle the petitioner to relief, but *a review of the court file shows the*

petitioner was convicted of attempted murder . . . [that does not meet the criteria of SB 1437], it would be *entirely appropriate to summarily deny the petition* based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing."[4] (Italics added by Judge Kennedy.)

Judge Kennedy stated in his order that he had indeed "review[ed] the court file." This was not only proper, it appears entirely consistent with the language and purpose of section 1170.95.

Subdivision (b)(1)(B) requires the petition to include "The superior court case number and year of petitioner's conviction." Subdivision (b)(2) provides: "If any of the information required by this subdivision is missing from the petition and *cannot be readily ascertained by the court*, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information." The language we have italicized clearly contemplates—indeed, authorizes—the court to conduct an independent investigation to make good a correctible deficiency in the petition.

The first sentence of subdivision (c) provides: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." This language indicates that the trial court is not a rubber stamp, reduced to merely checking to see if the petitioner's allegations check the boxes listed in subdivision (a). On the contrary, the court is given an independent role, to "review the petition," using "readily ascertain[able]" information, and then

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[4] The material by Judge Couzens, whom we recently recognized as one of "the authors of the leading treatise on sentencing" (*People v. Curry* (2016) 1 Cal.App.5th 1073, 1082) was subsequently incorporated into that treatise. (2 Couzens et al., Sentencing California Crimes (The Rutter Group 2019) § 23:51, pp. 23-150–23-151.)

the court shall "determine [for itself] if the petitioner has made a prima facie showing that the petitioner falls within the provisions" of section 1170.95.

Lastly, in terms of the actual hearing, subdivision (d)(2) provides: "If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner." How is such a finding to be ascertained? What sort of information will be "readily ascertain[able]" without the assistance of counsel? Subdivision (d)(3) gives the obvious answer: "The prosecutor and the petitioner may rely on the record of conviction . . . to meet their respective burdens." What if, as here, the conviction is decades old, when juries were seldom asked to make recorded determinations as to the prominence of the defendant's conduct in the criminal act, or his or her mental state? But if the court is making an eligibility determination, Morrison would deny the court the power to consult the record of conviction, its own records, on its own, when the petitioner merely parrots the language of subdivision (a). This defies logic—and common sense.

The bedrock goal of statutory construction is to effectuate the purpose of the statute. (E.g., *People v. Pennington* (2017) 3 Cal.5th 786, 795; *People v. Tran* (2015) 61 Cal.4th 1160, 1166.) Attention is always given to the context in which the words are used. (E.g., *People v. Gonzalez* (2014) 60 Cal.4th 533, 537; *People v. Anderson* (2010) 50 Cal.4th 19, 29.) "[O]ur task is to select the construction that comports most closely with the Legislature's . . . intent, with a view to promoting rather than defeating the statute's . . . purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results." (*Imperial Merchant Services, Inc. v. Hunt* (2009)

47 Cal.4th 381, 388; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1291.)

In the context of busy trial courts screening petitions to determine whether a prima facie showing of entitlement to relief is made, we are certain that "unreasonable, impractical, and arbitrary" would indeed describe the results if, as Morrison urges, those courts could not consult the judgment of conviction in their own case files and records.

It would be unreasonable because, in terms of speed, accessibility, and efficiency, the court's own records are obviously those most "readily ascertained by the court." It would be impractical to make the court dependent upon whether, or what part, the parties choose to produce "the record of conviction" at a full-blown hearing, when recourse to the court's own records could obviate the need for that hearing. And it would be arbitrary to deprive the trial court of the power to most expeditiously—and reliably—determine that no hearing is needed, thus sparing everyone time and expense.

The two most obvious analogues to the statutory procedure here are the prior sentence reduction measures commonly known as Propositions 36 and 47. Each of these measures give the trial court the authority to determine if the petitioner was eligible for relief. (See §§ 1170.126, subd. (f) [Prop. 36: "Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria [for eligibility]"], 1170.18, subd. (b) [Prop. 47: "Upon receiving a petition [for recall of sentence], the court shall determine whether the petitioner satisfies the criteria [for eligibility]"].) In using that authority, trial courts have regularly and routinely consulted the record of conviction in determining whether the petitioning defendant has met his or her burden of showing eligibility for

resentencing under both Proposition 36 (*People v. Bradford* (2014) 227 Cal.App.4th 1322) and Proposition 47 (*People v. Johnson* (2016) 1 Cal.App.5th 953.) Indeed, this is already what is happening in both trial and appellate courts for section 1170.95. (E.g., *People v. Verdugo*, *supra*, 44 Cal.App.5th 320 [trial court used Court of Appeal opinion to determine petitioner was ineligible for relief]; *People v. Cornelius* (2020) 44 Cal.App.5th 54 [same]; *People v. Lewis* (2020) 43 Cal.App.5th 1128 [same]; *People v. Ramirez* (2019) 41 Cal.App.5th 923 [Court of Appeal used its prior opinion to establish that a petitioner was eligible for relief].) Our Supreme Court has indicated its approval of this approach in other post-appeal contexts. (See *In re Reno* (2012) 55 Cal.4th 428, 484 [habeas corpus]; *People v. Shipman* (1965) 62 Cal.2d 226, 230 [coram nobis].)

In sum and in short, there is nothing to indicate the Legislature intended section 1170.95 to reward artful pleading that is easily shown to be demonstrably false.

To illustrate, suppose a petitioner submits the declaration required by subdivision (b)(1)(A) averring "that he or she is eligible for relief . . . based on all the requirements of subdivision (a)," including that the petitioner "could not [now] be convicted of first or second degree murder." (§ 1170.95, subd. (a)(3).) However, suppose further that this representation is untrue because the petitioner "was the actual killer." (§ 189, subd. (e)(1).) Or suppose that the petitioner does not advise the court that the victim was an on-duty police officer, another exception made by SB 1437. (*Id.*, subd. (f).) And, finally, suppose that these disqualifications for relief would be disclosed by the unpublished Court of Appeal opinion affirming the petitioner's murder conviction.

What purpose would be served by appointing counsel, compelling the prosecutor to respond, and holding a hearing when the result is already known? To require a hearing in these circumstances "would be to force resort to an arid ritual of meaningless form." (*Staub v. City of Baxley* (1958) 355 U.S. 313, 320.) It would also be an absurd result, which we are duty-bound to avoid if possible. (E.g., *People v. Mendoza* (2000) 23 Cal.4th 896, 908; *Arntz v. Superior Court* (2010) 187 Cal.App.4th 1082, 1094.)

In light of the foregoing, we reject Morrison's construction of section 1170.95 as precluding a trial court from making an independent determination concerning the threshold issue of whether a petitioner is eligible for relief. In connection with section 1170.126, which established a similar procedure for Three Strike defendants, the Court of Appeal in *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 6–7, used language that is equally applicable to section 1170.95: "The statute accords [the petitioner] the right to a resentencing hearing only upon a showing that he is *eligible*. It is not a right to a hearing on the issue of eligibility . . . . [¶] . . . [E]ligibility is *not* a question of fact that requires the resolution of disputed issues. The *facts* are limited to the record of conviction underlying a defendant's commitment offense . . . . What the trial court decides is a question of *law*: whether the facts in the record of conviction . . . establish eligibility." (Some original italics omitted.)

Judge Kennedy Did Not Err By Summarily Denying Morrison's Petition Upon Concluding That He Had Not Made A Prima Facie Showing And Was Ineligible For Relief Under Section 1170.95

Section 1170.95 does not define "record of conviction," and our Supreme Court has not formulated a comprehensive definition, but the term does have a generally accepted meaning: the "record of conviction" includes "only . . . those record documents reliably reflecting the facts of the offense for

which the defendant was convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223; accord, *People v. Trujillo* (2006) 40 Cal.4th 165, 179.) Morrison's construction would deny the trial court the power to consider a written opinion from an appellate court, even though our Supreme Court has determined that a postconviction opinion of an appellate court can indeed be part of the record of conviction, and may be used to "help determine the . . . nature of the defendant's prior conviction." (*People v. Woodell* (1998) 17 Cal.4th 448, 451; see *People v. Trujillo*, *supra*, at p. 180 ["an appellate court decision . . . can be relied upon to determine the nature of a prior conviction because it may disclose the facts upon which the conviction was based"].) In fact, the Supreme Court called it "one of the most logical sources to consider" for a number of reasons:

"An opinion that either affirms, reverses, or modifies a conviction is one of the most logical sources to consider in determining the truth of the prior conviction allegation. The trial court record alone might be incomplete because it might not include a later reversal or modification. The appellate opinion reflects what is in the trial record. Often, it will be more practical to obtain the opinion than the trial record, especially when the conviction is old . . . . The record, including transcripts, might be massive . . . . Additionally, the record might have been destroyed during the many years that sometimes elapse between the finality of a conviction and its [later] use . . . . Obtaining the opinion, which reflects the trial record, might be easy, while obtaining the actual trial record might be impractical or even impossible." (*People v. Woodell*, *supra*, 17 Cal.4th 448, 456–457.) The court also stated: "If the appellate court did state the pertinent facts, a trier of fact is entitled to find that those statements accurately reflect the trial record." (*Id*. at p. 457.)

Morrison thinks it was improper for Judge Kennedy to have quoted a Ninth Circuit opinion to establish the facts of the underlying murder. In the abstract, he might have a point.[5] But his petition virtually asked Judge Kennedy to look at it, thus making it a textbook example of invited error. Moreover, Morrison does not claim that the Ninth Circuit's factual narrative is inaccurate in any detail.

In any event, what *was* in the record of conviction and what Judge Kennedy would have had full license to quote—and which, we suspect, was the basis for the Ninth Circuit's factual narrative—was this court's 1976 opinion affirming Morrison's conviction. (*People v. Morrison* (Jan. 6, 1976, 1 Crim. No. 13342) [nonpub. opn.].) With minor editorial modifications, we quote it now:

"On April 21, 1973, Martinez Police Officer Thomas Tarantino stopped by the side of Highway 4 at 2:35 p.m. to see if a Black male adult, later identified as the defendant, lying under or near an old blue pickup truck needed aid. Defendant testified that the driveshaft on his truck broke and he was removing U-bolts in preparation for installing another driveshaft. A succession of persons testified [as] to what then happened. [Witness 1] and [Witness 2] saw the defendant lying on a hillside with the officer either approaching or bending over him. [Witness 3] observed the defendant and the officer standing and talking. [Witness 4] and [Witness 5] saw the officer patting down defendant who was in a spread eagle position. [Witness 6] saw

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[5] Our Supreme Court's most considered word on the subject is that the record on appeal "includes appellate court documents at least up to finality of judgment," "but no further." (*People v. Woodell*, *supra*, 17 Cal.4th 448, 455, 456; see *People v. Trujillo*, *supra*, 40 Cal.4th 165, 180 ["the court may look to the entire record of the conviction, '*but no further*.' "]) The Ninth Circuit opinion, *Morrison v. Estelle*, *supra*, 981 F.2d 425, affirmed the denial of habeas corpus long after Morrison's conviction became final in 1976.

the officer and defendant struggling with one another. She and another motorist then saw the officer thrown by the defendant onto the highway and saw the defendant dragging the officer across the highway and kicking him, while holding what appeared to be a police service revolver.

"[Witness 7] saw the defendant waving a gun in the air and then pointing it at the officer's head. [Witness 8] saw the two men struggling, heard three shots, and saw the officer fall. [Witness 8] then saw the defendant with a gun in his hand, saw the officer stand and again struggle until he fell and another shot was fired. [Witness 9] saw the officer and the defendant wrestling on the ground, then saw the officer on the ground, with the defendant standing over him and heard a loud noise. [Witness 10] saw the two wrestling on the ground and heard what sounded like firecrackers. [Witness 11] saw the two men wrestling, then saw the defendant with gun in hand get the officer down on his back and shoot him. None of the witnesses saw anyone other than the two men at the scene, nor did they see any motorcycles.

"Two California Highway patrol officers testified. Officer James Leonard arrested defendant who said, 'you got it all wrong.' Officer Kalis found Officer Tarantino lying on his back with wounds in his head and stomach and with his holster empty. Officer Tarantino died at the hospital that afternoon from gunshot wounds.

"[J. K.], defendant's nephew, testified that he and defendant were driving on Highway 4 in the pickup truck when the driveshaft dropped and the coasted to a stop. Two Black males in a Chevrolet El Camino with a motorcycle in the back stopped to ask directions to a Pittsburg motorcycle rally and [J. K.] left with them to get help for the disabled truck. [Witness 12] testified that several times during the month, and on the day in question,

he saw defendant with a small caliber handgun similar in size and shape to a .22 revolver found in Officer Tarantino's right front pants pocket. The gun was wired together with wire similar to that found in defendant's truck. In Tarantino's shirt pocket was a driver's license of defendant's. Tarantino was shown to have a consistent habit of putting in his right front pants pocket any evidence taken by him from a person in custody and of putting the driver's license of such person in a shirt pocket. Tarantino's service revolver was found with blood on it on a hillside at the scene. It contained two unfired bullets and four cartridge cases. A bullet from Officer Tarantino's service revolver was found embedded in the pavement where his head rested.

"Defendant's story was that on the day in question he had drunk a considerable quantity of beer and wine and Black Velvet [whiskey]. The truck broke down and [J. K.] left for help. Sometime after that Officer Tarantino stopped and asked Morrison what the trouble was. Just as Officer Tarantino was leaving two Black men on a motorcycle stopped to ask directions to Pittsburg and a ruckus started. Then the defendant heard several shots and the two men drove off. The defendant came out from under the truck and tried to pick up the injured officer. He then ran to the highway to wave down a car. No one stopped until Officer Leonard arrived. He denied ever struggling with or shooting Tarantino or holding his service revolver. A sample of defendant's blood corresponded to definite drunkenness. An expert opinion was given that defendant could not have formed an intelligent, logical or premeditated thought with malice to kill somebody; rather his conduct was more like a rash impulse to fight. The expert opined that defendant's story about the two men on a motorcycle was a combination of 'things he remembered, and filling in the things he didn't. . . . In fact, it is called

confabulation,' i.e., '[m]aking things up as one goes along to fill in a void in one's memory.' "

Our opinion throws several salient points into relief. First, although it was not charged, the jury was instructed on felony murder, the prosecution theory being that Morrison robbed or attempted to rob Officer Tarantino prior to his murder.[6] Second, Morrison was not an aider or abettor, but the actual killer, thus putting him outside the reach of SB 1437. (See § 189, subd. (e) ["A participant in the perpetration or attempted perpetration of a felony . . .in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer"].) Third, even allowing for the possible involvement of his nephew, Morrison "was a major participant in the underlying felony and acted with reckless indifference to human life." (*Id*., subd. (e)(3).) Fourth, and most significant, the victim was an on-duty peace officer. (*Id*., subd (f) ["Subdivision (e) does not apply to a

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[6] We stated in our opinion that "Morrison was indicted by the Contra Costa County Grand Jury for murder (Pen. Code, § 187), assault with a deadly weapon on a peace officer (Pen. Code, § 245, subd. (b)), and two counts of possession of a firearm by a convicted felon (Pen. Code, § 12021). It was also alleged that Morrison had suffered a prior conviction of voluntary manslaughter. . . . [¶] . . . After a trial by jury defendant was found guilty of first degree murder (count 1), of assault with a deadly weapon on a peace officer (count 2) and of using a deadly weapon in the commission of these two offenses. Defendant was also found guilty of two counts of possession of a firearm by a convicted felon (counts 3 and 4) and the alleged prior conviction was found to be true."

The fact Morrison was not charged with robbery or attempted robbery did not preclude liability for felony-murder. (See *People v. Bernard* (1994) 27 Cal.App.4th 458, 470 ["it was unnecessary for the underlying felonies to have been charged in order for the prosecution to argue for felony-murder"]; *People v. Davis* (1995) 10 Cal.4th 463, 514 [" 'it is not necessary to separately charge a defendant with either a felony-murder theory or the underlying felony,' " quoting *Bernard*].)

defendant when the victim is a peace officer who was killed while in the course of his or her duties"].)[7]

The authorities cited by Morrison do not convince. *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472 considered whether there was sufficient evidence presented to avoid nonsuit; nothing was said about the force of unchallenged allegations. The court in *Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, 418 did state "it would ordinarily be error" to use an appellate opinion "to establish the truth" "of the facts surrounding the homicide" (ditto for *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130, fn. 7), but it said nothing about a statutory procedure that intends such opinions be consulted for the truth of the underlying trial record. And Morrison misreads *In re Taylor*, *supra*, 34 Cal.App.5th 543. There, Division One of this District concluded that the petitioner was entitled to relief in habeas corpus to vacate a special circumstance of his felony murder conviction. However, it declined to vacate the murder conviction itself, concluding "the more efficient course is for Taylor to seek to overturn his murder conviction by filing a section 1170.95 petition in the superior court." (*Id.* at p. 562.) It is true Division One summarized the provisions of section 1170.95 with the words quoted by Morrison, but that language does not amount to a formal examination of that statute, still less an actual holding that a petitioner has only to frame allegations for relief in order to achieve automatic entitlement to counsel and a hearing.

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[7] To be fair, it is virtually—if implicitly—conceded by Morrison in his petition that the victim was a police officer. The majority of his petition is devoted two points from which he has never deviated: (1) Officer Tarantino was killed by one or both of the motorcyclists, and (2) he received ineffective assistance of counsel at the trial.

Judge Kennedy identified two separate and independent grounds of ineligibility: (1) Morrison was the actual killer, and (2) the victim was an on-duty police officer. Our review has confirmed both grounds.

We close by again quoting Judge Couzens, because his words could have been written with this case in mind: "It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief." We cannot believe the Legislature intended to permit, still less mandate, such pointless inefficiency and waste.

DISPOSITION

The order is affirmed.

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

People v. Morrison (A156981)